Page 3 UNITED STATES DISTRICT COURT APPEARANCES CONTINUED: NORTHERN DISTRICT OF INDIANA **DUERRING LAW OFFICES** 2 SOUTH BEND DIVISION BY: MARIELENA DUERRING CITY OF SOUTH BEND. 3 Colonia Place Plaintiff, 61191 US 31 South SOUTH BEND COMMON COUNCIL, CAUSE NO. : South Bend, Indiana 46614)3:12:cv-475 ET AL. (574) 968-0250 Defendants. attymduerring@sol.com BRIAN YOUNG, SANDY YOUNG, Appearing on behalf of the defendants TIMOTHY CORBETT, DAVID WELLS, 6 and STEVE RICHMOND, ICAUSE NO.: Scott Duerring and Karen Depacpe 13:12-cv-532-JVB-CAN Plaintiffs, 7 VS. MAY, OBERFELL, LORBER THE CITY OF SOUTH BEND, Acting 8 Through its Police Department, BY: ROBERT J. PALMER DARRYL BOYKINS, Individually and in his Official Capacity as 9 4100 Edison Lakes Parkway Mishawaka, Indiana 46545 Chief of Police, KAREN DEPAEPE, and SCOTT DUERRING. 10 (574) 243-4100 Defendants ewalton@maylorber.com 11 The deposition of: THOMAS FAUTZ. Tuesday, April 16, 2013. 4:36 p.m. EST. Appearing on behalf of the South Bend Common Council 12 DATE: TIME: 13 May, Oberfell and Lorber ALSO PRESENT: 14 4100 Edison Lakes Parkway 15 Mishawaka, Indiana 46545 Called as a witness by the defendants, Scott Scott Duerring Duerring and Karen Depacee, pursuant to notice of deposition Darryl Boykins 16 as to date, place and time, and in accordance with the Indiana Rules of Civil Procedure, and as reported by Brian Young MICHELLE A. WHITAKER, Notary Public, RPR, Associate THOMAS FAUTZ DEPOSITION EXHIBITS: 1.8 MARILYN M. JONES & ASSOCIATES, LTD. 2 - Sworn statement of Thomas Fautz 19 COMPUTER-ASSISTED REPORTERS 4 - Office of professional standards, seven-page document 20 1416 FRANKLIN STREET MICHIGAN CITY, INDIANA 46360 (Exhibits Two and Four marked in a previous deposition and 21 (219) 879-4077 22 utilized herein.) 23 6 - Position description 24 -000 25 Page 4 Page 2 Tuesday, April 16, 2013 --APPEARANCES: FAEGRE BAKER DANIELS 2 (All parties present in the conference room BY: EDWARD A. SULLIVAN, III 3 202 S. Michigan Street, Suite 1400 ٦ at or about 4:36 p.m. Witness sworn.) South Bend, Indiana 46601-2020 THOMAS FAUTZ (574) 234-4149 ed.sullivan@faegrebd.com Having been first duly sworn, then testified as 5 Appearing on behalf of the plaintiff 6 follows: City of South Bend 7 DIRECT EXAMINATION 8 CITY OF SOUTH BEND BY MS. DUERRING: 8 BY: ALADEAN M. DeROSE Q. Can you go ahead and state your name. 9 9 County-City Building South Bend, Indiana 46601 A. Thomas Fautz. F as in Frank, a-u-t-z as in zebra. 10 10 (574) 235-5866 Appearing on behalf of the plaintiff 3 T. Q. How do you prefer I refer to you today? 11 City of South Bend "Tom" is fine. 12 A. 12 PFEIFER MORGAN & STESIAK Q. Okay. Tom, have you ever been deposed before? 13 13 BY: DANIEL PFEIFER 14 A. Yes. 53600 North Ironwood Drive 14 South Bend, Indiana 46635 O. Just a couple ground rules before we get started. (574) 272-2870 dofeifer@nilawvers.com 15 Obviously, you need to answer out loud for purposes of the Appearing on behalf of the plaintiffs 16 court reporter. Try to avoid nodding the head or shaking 17 Brian Young, Sandy Young, Timothy Corbett, David Wells and Steve Richmond 17 the head or um-hums or huh-ums, 'cause they don't go down 18 18 DIXON, WRIGHT & ASSOCIATES, P.C. very clearly on the record. And I'll try to remind you if BY: THOMAS M. DIXON 19 55255 Birchwood Court 20 you have that tendency. Osceola, Indiana 46561 20 (574) 315-6455 If I ask a question that you don't understand, 21 tdixon3902@comcast.net please indicate that to me so I can rephrase it or repeat 22 21 Appearing on behalf of the defendant 23 it. Otherwise, I'm going to assume that you understood the 22 Darryl Boykins question that I asked and your response reflects that 23 understanding. 25

Page 7 Page 5 recorded? 1 And lastly, if you need a break, just let me know. 2 A. Yes. 2 All right? 3 Q. And how did that happen? 3 A. Thank you. A. Can't say specifically. It was either through the Q. Are you currently employed? 4 4 division chief Kilgore or through Karen. I really can't say 5 A. Yes. 5 specifically. б 6 Q. And where do you work? 7 7 Q. Thinking about this time period right at the A. Martin's Supermarket Corporation. beginning of your time as chief of police, what lines were 8 Q. What is your position with Martin's? 8 9 recorded at that time? 9 A. Director of security. A. It's my understanding, but I had no firsthand 10 10 O. How long have you worked for Martin's? knowledge, that at that time, the front desk, the radio 11 11 A. A little over five years. room, the detective bureau chief's office - not office, but Q. What was your previous employment? 12 the secretary, I should say, the chief of police's 13 13 A. City of South Bend Police Department. O. How long did you work for the City of South Bend 14 secretary. 14 Let me think here. I believe – I believe that 15 15 Police Department? 16 was it. 16 A. A little over – about thirty-four and a half 17 I think there was a phone in the — what would be 17 years. called the uniform supervisor's office, that the line rolled Q. And what was the highest position that you reached 18 18 over to that - from the front desk. Those phones weren't 19 during your tenure at the City of South Bend Police 19 20 being asked. 20 Department? 21 I think that's it, as far as I can remember. 21 A. I retired as the chief of police. Q. How long were you in the position of chief of 22 O. Were you familiar with the mechanics of that 22 23 system? 23 police? 24 A. I knew that the old system prior to me becoming 24 A. I always get this confused. It's 2002 -25 chief -- and I'm not sure when it changed over -- was 25 September of 2002. Don't know the exact date. Sometimes I Page B Page 6 reel-to-reel. Like I say, being involved in investigations, get confused at 2001, but it was 2002. at times you would - you would seek evidence, especially in 2 O. And your retirement date was when? homicide. And at some point, it changed to digital. When A. December 28th, 2007. 3 3 that happened, I can't say for sure. 4 4 Q. Who was the chief prior to you? Q. When the change was made to digital, did you have 5 5 A. Larry Bennett. a specific understanding of how that system worked to б O. I'd like you to think specifically to the time 6 7 actually capture phone calls? 7 period of 2002 through 2007, when you were the chief of A. I knew it was – it was a lot easier for Karen to 8 police. At some point during your tenure as chief of obtain specific times. And I think the retention of tapes police, did you become aware that there was a system in 9 10 was longer. But as far as getting into the mechanics of it, 10 place that allowed you to record phone lines? no, I was never briefed or was involved in that. 11 11 A. Yes, I did. Q. During the entire time that you were chief of 12 12 Q. And when did you become aware of said system? police, was Karen the individual that administered that A. Well, over - over many years, I knew there was 13 13 system? 14 lines recorded. Having worked homicide and other investigations, I knew 911 lines and certain lines at the 15 A. Yes. 16 Q. Did she also have the responsibility for front desk were recorded. 17 maintaining that system? When I became chief of police, I gained a little 17 A. Yes. 18 1.8 more knowledge on specifics about the taping system. O. Now, if changes were to be made to the system, did 19 19 Q. Who educated you with respect to the specifics? 20 that have to be approved by you? 20 A. Karen Depaepe. A. I would say either myself or one of the division 21

22 chiefs. Services chief specifically. There was no specific

Q. And let me be a little bit more specific. When I

25 say "changes," I mean in the sense of adding any additional

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protocol, so to speak.

Q. Now, at the beginning of your time period as

O. Okay. Did you become aware of which lines were

22 chief, were you ever presented information with respect to

lines that had been typically recorded?

A. Not that I can recall.

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1 lines or subtracting lines that were recorded lines under 2 the system.

A. Again, it would have to be done through Karen.

- However, there was no specifics on that the chief had to do
- it or that the division chief in services who oversaw that
- division was in charge of that. But I would expect that it
- 7 would be something that the chief would have the major
- say-so on approving or authorizing.
- 9 Q. And when you say "chief," you mean chief of 10 police --
- A. Yes. 11

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- 12 Q. - and not just a division chief?
- A. Yes. 13
- 14 Q. Were you familiar with the mechanics of how a line was actually recorded?
- 16 A. No.
- 17 Q. Now, you had testified that when you first became
- 18 chief, that you were aware that certain lines were being
- recorded. Were you aware of the rationale behind why those
- lines were recorded?
- 21 A. The rationale simply would be to record
- conversations from the public calling in to, say, 911,
- reporting of a crime that could potentially become evidence
- 24 at some point. The front desk, same thing. Some people
- 25 call that number instead of the 911 system, for police

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- assistance. And it's used to document -- document calls as an investigative tool and documentation.
- Q. Did there ever come a point in time that you authorized additional lines to be added to the recording system itself?
- A. Yes.

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- Q. And can you tell me specifically what lines were
- A. It was -- and again, this is about eight years ago. So, it was I would say sometime in late 2004, mid-2004, in that time frame. As we were transitioning from - the police department was going through a remodel 13 process, and we were transitioning into the remodeled section to where there was better office space. Internal affairs had their own suite of rooms. There were some 16 changes made in that way.

17 And at that time, we were under a lot of scrutiny by the public, being accused, especially being attacked, on 19 how we handled complaints and that we did not adequately document complaints or respond to them. So, we wanted there was open discussion amongst the command staff on, you know, how do we improve on this and how do we protect ourselves. Because we really felt like we were doing an 24 adequate job in handling complaints.

In fact had -- had extended to -- as an example,

some people were claiming that they didn't want to come down

- 2 to the police station, they felt intimidated. So, we --
- 3 through the park department, human rights commission, we
- obtained space over there on a bus line, handicap
- 5 accessible, allowing people to go there for complaints. So,
- 6 we really felt -- we added IA pro to track individual
- 7 officers. We were trying to do everything we could to be as
- 8 transparent with the public yet document what we were doing.
- 9 At that time, Chief Eugene Kyle, who was the detective chief, had requested that his line be taped. 10
- 11 Based on that conversation, it opened the door of what other
- 12 lines do we want to tape. Decided that my line would be
- 13 taped, Chief Kyle's line would be taped, and that Jim
- Hassag, who was the uniform chief at the time, that his line
- 15 would be taped, all with everybody's knowledge. 16

And Chief Kyle's specific request, he asked that it be taped. The rest of us said, "Well, yeah, that's the way to document." It would be a useful tool for that individual person whose office it was at to use to be able to document conversations and anyone that called in, to show 21 that we were responsive.

At the same time, because internal affairs was 23 moving into their suite and John - Lieutenant John Collins 24 was the investigator for that section, one of the lines in internal affairs was taped as well. And John Collins was

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made aware of that.

So, as far as - as far as I can relect recollect, the only time I requested that any changes be made that was - was that one time. And that was to add those particular lines.

- Q. Okay. Now, it sounds like you basically were designating lines that were associated with the officers that were in positions of authority. Is that fair to say?
- A. Positions of authority, we didn't -- like the services chief or the community relations chief, they really didn't deal with a whole lot of specific complaints about not investigating properly or internal-affairs-type things or complaints against officers, so theirs were not included.

But Chief Kyle, who was in the investigative division, and Chief Hassag, who ran the uniform division, which is usually the most high-profile area, and myself, those were the ones, you know, that we designated.

- Q. So, if I understand you correctly, these chiefs that were in positions that frequently dealt with the public? 20
 - A. Correct.
- 22 Q. And these were the individuals that, I guess for 23 lack of a better word, would be subjected to potential 24 complaints? 25
 - A. Correct. And it provided them with a tool that

Page 17 the lead -- leading expert there, and anything you would you know, I sold him a car and it's a lemon, can you tape my 2 want done or you requested something for a case, you would line, you would have said no? have to go through Karen, who has the ability to monitor or 3 A. I can't say definitely no. I'd have to hear make copies of tapes. 4 everything about it, and I would probably consult the city 5 Q. Okay. Now, Karen's position was communications 5 attorney on it. 6 director while you were there. Is that correct? 6 Q. From my description, would that -- would that 7 appear to you -- just in your opinion. I'm not asking you 8 Q. And is it fair to say that you were in Karen's to make a legal judgment. But from my description - and 9 direct chain of command? I'll repeat it. He says I want my line recorded because I 10 A. Well, she reported directly to Chief Kilgore, but 10 sold a car to my neighbor that's a lemon and now he's giving 11 then I was in charge of the department. 11 me a hard time about it. 12 THE DUERRING: Pass the witness. 12 A. Well, giving a hard time -13 CROSS EXAMINATION 13 MR. PFEIFER: Objection. Asked and answered, 14 BY MR. DIXON: 14 first of all. And secondly, I don't even know 15 Q. You gave a sworn statement, right, to Mr. Pfeifer, 15 that there's a question. 16 at his law firm in October of 2012, right? 16 MR. DIXON: I didn't -- well, I want to 17 A. Yes. 17 finish the question. 18 Q. Did you review that in anticipation of this 18 MR. PFEIFER: Okay. 19 deposition? Q. So, would that appear - would recording that line 19 20 A. Yes, I did. And I did find one mistake. 20 based just on that information that I gave to you - would 21 O. I'm not --21 that appear to you to be a law enforcement purpose? 22 A. Oh, okay. 22 A. On what you said right there, if there's no 23 Q. I'll let you go to that, but you'll knock me off 23 threats, "I'm gonna kill you," those kinds of things, I 24 stride. 24 would probably say no. 25 A. Sure. 25 MR. DIXON: Okay. I don't have any further Page 18 Page 20 1 Q. Do you have it with you now? questions. Thank you. 2 A. I have just been handed a copy. **CROSS EXAMINATION** 3 Q. Okay. Turn to page four. Let's look at lines 3 BY MR. PALMER: nine through eleven. I'll just read it and you can confirm 4 Q. Under your command, was the recording system ever if I've read it correctly. Okay? "There was one line in 5 used to intimidate anyone? that section that belonged to Chief Eugene Kyle, and upon 6 A. Not -- not to my knowledge. 7 his request, that line was, on my authority taped." Right? 7 Q. Was that a motivation for implementing the That's what it says? 8 recording system? 9 A. Yes. 9 A. No. It was -- it was to gather evidence and --10 Q. Is that the mistake that you're talking about? 10 and serve as a tool for those individuals who had their 11 A. No. 11 lines taped to either defend themselves or document what had 12 Q. Okay. So, that's a correct statement? All -12 taken place. 13 everything I read there is a correct statement of yours? 13 Q. And that would be the same answer if I asked you 14 A. Chief Kyle requested his line be taped, and it 14 if the motivation was to embarrass or harass anyone? 15 was. 15 A. I would not put up with that. 16 Q. On your authority? 16 Q. The answer would be the same, that that was not a 17 17 motivation? Q. In other words, you were ultimately the one who 18 A. Yes. 18 1.9 said yes, that's okay to do? 19 Q. Would you consider the purposes to document 20 A. Yes. 20 complaints and to use as a tool to be a legitimate business 21 Q. And if you would have said no, then it wouldn't 21 purpose? 22 have been done? 22 A. Yes. 23 A. No, it wouldn't have. 23 Q. In your opinion or to your knowledge, is the

24 recording of lines into a police station something that's

ordinarily done by other police stations around the country?

Q. And if Kyle had come to you and said I want to get

25 some dirt on my neighbor who keeps calling in on me for -

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MR. PFEIFER: Object to the form of the question unless you identify which lines you're talking about. Are you talking about all lines or certain lines. So, I'll object to the form of the

MR. PALMER: All lines.

MR. SULLIVAN: Objection. Lack of foundation.

Go ahead.

A. Could you repeat the question. I want to --

Q. To your knowledge, is it ordinary and customary 12 for police departments around the country in the United States to record at least some lines coming into the 13 14 office - into the station?

A. Yes.

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MR. SULLIVAN: Same objection.

Q. And what do you base that answer on?

A. Just good business practices. I mean, in this day 18 19 and age, you certainly -- in a 911 call, it happens so 20 quick, sometimes you want to go back and hear exactly what's 21 said. Provides evidence. I'm sure smaller agencies maybe 22 don't. But agencies the size of South Bend would certainly

23 have some type of a recording system, I would think. Can't

24 say specifically, but I would think.

Q. How did you come about this knowledge? Was it

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1 through discussions with other police chiefs? through 2 reading? Your knowledge about use of recorded lines in other police stations. 3

A. I guess I would just be speculating, because I 4 5 can't say for sure. I mean, I have worked investigations with other departments where, you know, they had evidence, or just watching on TV, you know, when they play 911 tapes 7 and those kind of - type of things. I would assume that 8 most police departments would, you know, capture that.

Q. And it's not simply for 911 calls, if I understand 11 your testimony. It's also to document complaints about 12 individual officers or procedures that the police department

13 have employed in following up?

A. I really can't speak for --14

15 O. For your --

A. I'm trying to act as an expert here talking about 16 other departments. 17

Q. Let me rephrase the question. 18

A. But I think it's common practice. 19

Q. Let me rephrase the question. In your 20

21 department -- in the South Bend Police Department, it was

22 not simply for 911 calls that you taped lines, but it was

also to document complaints from the public and to, as you

said -- used the word, be transparent with the public?

A. Yes.

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MR. PALMER: That's all the questions I have. 1

CROSS EXAMINATION 2

3 BY MR. SULLIVAN:

O. Chief, who followed you in the position of South 4

Bend Police Department chief? 5

A. Chief Darryl Boykins.

Q. Chief Boykins. And was he a division chief under 7

8 you before that?

9 A. Yes, he was.

O. What -10

A. He was the uniform division chief. 11

O. Okay. Was he in that position when -- if memory 12

serves me, I think you were describing conversations that 13

you had to establish this practice of recording some of 14

15 these lines. Was he a part of those conversations?

16 A. No.

17 Q. Okay. Why not?

A. He wasn't in that position at that time. 18

Q. Do you recall what position he was in at that time 19

those conversations took place? 20

A. He would have been a captain. I believe he might 21

have been with internal affairs, but I - I can't say for 22

23 sure.

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24 Q. That's fine.

Now, when you were chief of police, it was one of

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your responsibilities to establish practices and procedures

for the department?

A. Yes.

O. Okay. Is the policies for the South Bend Police 4

Department contained in the duty manual? 5

6 A. Yes.

O. If the duty manual is changed, does that have to 7

be approved by the board of public safety? 8

9 A. Yes.

O. But as far as the practice that occurs in the

department, you don't go to the board of public safety for 11

12 that?

13 A. No.

Q. That was under your authority to develop and 14

establish practices and procedures? 15

A. Yes. Yes. 16

Q. Was it ever the practice of the South Bend Police 17

18 Department, while you were the chief, to designate certain

division chiefs as having telephone lines to be recorded at 19

all times? That is, the position rather than the person who 20

happened to be in the position? Was it ever the practice? 21

A. No.

Q. Did you ever intend to establish that practice? 23

24 A. No.

Q. Was it ever the practice of the South Bend Police

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Page 63 Page 61 of privacy in his own office when he became the 1 1 know about it. And we weren't out there to broadcast it or chief of police, that runs directly to the issue 2 2 put on the news that anybody calling in to internal affairs of whether or not a police officer has an 3 3 would be taped. 4 expectation of privacy on the telephone line. Q. I'm not talking about making a press release. I'm 4 That's the equipment of the city. 5 talking about letting police officers - all the police MR. PFEIFER: I made my objection. б officers on the department know which lines are recorded. 7 Q. So, did you have your office searched for bugs MR. SULLIVAN: Objection. Argumentative. 7 when you became the chief of police? 8 Asked and answered. 8 A. I think all the chiefs did. It's kind of a Q. Well, I mean, that's what my - that's what my 9 9 common-type thing. 10 question is. Is that - is it the same answer with that 1.0 MR. DIXON: All right. Thank you. I don't 11 11 question? have any other questions. 12 12 A. Yeah. I mean, you know, I guess there's a lot of **RECROSS EXAMINATION** 13 ways -- in looking back on things, could you have done 13 14 BY MR. PALMER: 14 things differently? Certainly. Did what we thought was O. Tom, you -- you testified at great length your 15 15 best at the time, and, you know, that's pretty much it. practices regarding what you would do when you either added 16 O. Well, I'm just trying to understand this 16 or if a situation would come up where you were terminating a 17 17 expectation of privacy. And it's an important issue in this line that was being taped, that you would have an officer 18 18 case. And I'm also trying to understand what procedures you 19 implemented in order to presumably protect that expectation consent to it. You've testified as to your -- what your practices were? 20 20 of privacy. I'm not trying to second-guess you. I'm just A. Yes. 21 21 trying to understand how things went on back then. Q. Were those practices ever reduced to writing? Did - do you believe that a police officer had an 22 22 23 A. No. 23 expectation of privacy in their own - just in the space of O. Were those practices ever passed on from a prior 24 their own office? 25 police chief to you? 25 MR. SULLIVAN: Objection. Vague. And it Page 64 Page 62 A. No. 1 calls for a legal conclusion. 1 Q. Were those practices ever passed on from you to 2 2 Go ahead. 3 Chief Boykins? 3 A. I mean, you know, could you be a little more A. No. Other than the conversation about, you know, specific what -- like, searching their desk or those --4 5 it's your option. those kinds of things? I mean -- or peeking in the window 5 б O. You also testified as to director of or -- you know, I'm not --6 communications having, within the scope of that job, 7 7 Q. Just anything. If they -- if an officer goes into listening to tapes in - in respect to maintaining the his private office and closes the door, does he have an 8 8 system or if the state police requested or if there was a expectation of privacy? 9 FOIAR - FOIA request. If the director of communications MR. SULLIVAN: Objection. Vague. Calls for 1.0 10 was listening to the tapes within the scope of her a legal conclusion. 11 11 12 employment and heard something that he or she believed was 12 Go ahead. relating to illegal contact -- illegal conduct, would it be A. I don't know the legal conclusion. I would say 13 within the course and scope of her employment to inform 14 out of just common courtesy, yes. someone higher up the chain of command? Q. I've been informed that when you became chief of 15 16 A. Yes. 16 police you had your office searched for bugs. Is that O. The same question regarding unethical conduct. 17 17 correct? 18 Would it be within her scope and course of employment to A. I think --18 relay that to someone higher in the chain of command? 19 MR. PFEIFER: Objection. Relevance. 19 20 A. Yes. MR. SULLIVAN: Lack of foundation. 20 MR. PALMER: That's all the questions I have. 21. 21 MR. PFEIFER: And outside the scope of what 22 RECROSS EXAMINATION these depositions are intended to encompass. 22 BY MR. SULLIVAN: 23 MR. DIXON: No. It's right within the - the 23 Q. Chief, appreciate your patience a little more. Do 24 whole issue is the expectation of privacy. If he 24 25 you recall the questions from - I think it was Attorney didn't -- if the chief didn't have an expectation 25